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No. 90-311

In The

Supreme Court of the United States

October Term, 1990

BATEMAN EICHLER, HILL RICHARDS, INCORPORATED, JOHN R. BOLIN, THEODORE W. PRUSH,

Petitioners,

v.

JOHN D. RUOCCO, on behalf of himself and as representative of a class of persons similarly situated,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the District Court, as affirmed by the Ninth Circuit Court of Appeals, properly determined that Respondent John Ruocco, as a former plan participant, had a "colorable claim" to the distribution of surplus from the employee-funded plan.

2. Whether the District Court, as affirmed by the Ninth Circuit Court of Appeals, properly found that California Insurance Code Section 10270.65 was preempted by ERISA, since that provision directly relates to the administration of group disability plans which ERISA mandates is wholly a federal concern.

3. Whether the District Court, as affirmed by the Ninth Circuit Court of Appeals, properly awarded attorneys' fees against the Defendants under ERISA, since the award was appropriate under Ninth Circuit guidelines, and Defendants' written objections to the award were properly rejected by the District Court.

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STATEMENT OF THE CASE

There are several omissions in Petitioner's recitation of the case which necessitate restatement.

First, on page 7 of their Petition, Petitioners claim that "[i]n accordance with section 10270.65 of the California Insurance Code," BEHR retained the distribution to recover some of the earlier costs and contributions which

BEHR itself had supposedly incurred in connection with all of its insurance programs. Not only is the commingling of assets from various company plans in violation of the trust requirements of ERISA, but it must be noted that defendants Bolin and Prush, the two individuals most responsible for the decision to appropriate the UNUM distribution, had never heard of section 10270.65 until after this litigation began.

Secondly, on page 8, while it is true that the District Court found that Petitioners had not breached their fiduciary duties or acted in bad faith, the Court specifically found that the actions of BEHR in retaining the UNUM distribution were "arbitrary and capricious." (See A26 to Petition).

REASONS FOR DENYING THE WRIT

There are several reasons why this writ should be denied. First, as both lower courts held, Ruocco had a "colorable claim to vested benefits" under the terms of ERISA. Although he was a former plan participant, he and not BEHR had paid for the disability coverage, and he was therefore entitled to receive his share of the extraordinary UNUM distribution.

Secondly, as both lower courts held, California Insurance Code Section 10270.65, which Petitioners claim supports their retention of the UNUM distribution, is preempted by ERISA since it directly relates to the administration of an employee benefit plan, an area which Congress intended to be solely a federal concern.

While it is true that many other states have similar insurance provisions on their books, it is crucial to realize that none of these statutes has been cited since the passage of ERISA.

Finally, the petition should be denied since the factual basis of this lawsuit was extremely unique, and there is no conflict in the circuits which justify this Court's review.

I. THE NINTH CIRCUIT PROPERLY UPHELD THE DISTRICT COURT IN FINDING THAT RUOCCO WAS A "PLAN PARTICIPANT" WHO HAD A "COLORABLE CLAIM TO VESTED BENEFITS."

Petitioners first claim that the district court had no jurisdiction over the ERISA causes of action since plaintiff Ruocco was not a "participant" of a welfare benefit plan as mandated by ERISA. This argument lacks merit.

ERISA defines a "participant" as: "any employee or former employee of an employer . . . , who is or may become eligible to receive a benefit *of any type* from an employee benefit plan. . . . " 29 U.S.C. §1002(7) (emphasis added). The clear language of this provision defines plaintiff Ruocco as a "participant" of the BEHR LTD Plan. Ruocco brought this suit on behalf of all BEHR employees, past and present, who participated in the BEHR LTD Plan between 1982-84. Simply stated, both lower courts have found that the defendants misappropriated approximately $630,000 of Plan benefits for their own use. As mandated by the clear language of ERISA, Ruocco is a "former employee . . . who is . . . eligible to receive a benefit of any type from an employee benefit plan." U.S.C. §1002(7).

In *Bricklayers' Health & Wel. v. Brick Masons' Health,* 656 F.2d 1387 (9th Cir. 1981), plaintiffs, including several

former members of the Brick Masons' Fund, sued their former trust fund to return surplus contributions made by the former participants which had been kept in a separate account. The defendants challenged the suit, claiming that plaintiffs had no standing to sue, since they were no longer "participants" in the plan. The Ninth Circuit summarily held that the former members of the plan were indeed "participants," concluding simply:

> [T]he former participants allege that they are entitled to receive certain benefits from the Brick Masons' Fund; they are therefore participants for jurisdictional purposes."

Id. at 1391.

In support of their argument, defendants continue to cite three cases which are inapposite to the issue at hand, including *Freeman v. Jacques Orthopaedic and Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654 (9th Cir. 1983), (claim by former employee for additional pension benefits dismissed in part because claimant never enrolled in the plan), and *Joseph v. New Orleans Elec. Pension and Retirement Plan*, 754 F.2d 628 (5th Cir.), *cert. denied*, 474 U.S. 1006 (1985) (retirees who had already received final lump sum distribution were denied additional benefits after plan was subsequently amended to increase potential benefits).

Petitioner relies most heavily on *Kuntz v. Reese*, 785 F.2d 1410 (9th Cir.), *cert. denied*, 479 U.S. 916 (1986) (*Kuntz II*) in which former employees who claimed that their employer had misled them as to the extent of benefits available under their pension plan sued for damages based upon this breach of fiduciary duty. As with *Joseph*, the plaintiffs in *Kuntz II* had already received their lump

sum termination benefits; further, the claimants in *Kuntz II* were not seeking the recovery of "benefits," as mandated by the explicit terms of ERISA; instead, they sought only damages for their employer's breach of fiduciary duty in misrepresenting the terms of their coverage under the plan. The Ninth Circuit properly held that such a claim did not constitute a claim for a "benefit of any kind," and thus denied standing. Such a factual scenario has no bearing on the current case, in which plaintiffs seek specific benefits – the UNUM surplus and profit from exercising the warrants – to which they, rather than BEHR, were unquestionably entitled.

BEHR's interpretation of *Kuntz II* has been summarily rejected by *Amalgamated Clothing & Textile Workers v. Murdock*, 861 F.2d 1406 (9th Cir. 1988), in which plaintiff were paid a lump sum after the termination of their benefit plan. Subsequently, the defendant misappropriated tens of millions of dollars from the plan surplus. Plaintiffs sued under ERISA for damages, as well as the disgorgement of the defendant's ill-gotten profits. The defendant argued, as BEHR does here, that *Kuntz II* forbids former plan participants from bringing a cause of action for damages for breach of fiduciary duty, since 1) they had already received lump sum benefits; and 2) such legal damages did not constitute "a benefit of any type" for purposes of ERISA, thus denying these former employees standing. The Ninth Circuit rejected this interpretation of *Kuntz II* with reasoning directly applicable to the present case:

> There is a critical different between *Kuntz* and the case before us. In *Kuntz*, the plaintiffs alleged that plan fiduciaries had "lied about the amount of benefits that plaintiffs would get

> under the plan. . . . " Unlike the case before us, the *Kuntz* plaintiff *did not* allege that the fiduciaries *personally profited* from a breach of their duty of loyalty to the plan.
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> * * *
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> It would be ironic if the very acts . . . that allegedly resulted in a fiduciary personally obtaining ill-gotten profits should also serve to deny plan beneficiaries standing . . . to redress the fiduciaries' alleged breach of duty of loyalty.

Id. at 1418.

In the current case, as in *Amalgamated*, the fiduciaries did personally profit from their breach of duty. The additional monies into BEHR's coffers aided not only BEHR, but the individual defendants as well, who gained additional bonus income as a result of their retention of the UNUM distribution. *Kuntz II* is therefore off point.

II. THE NINTH CIRCUIT CORRECTLY AFFIRMED THE LOWER COURT IN HOLDING THAT CALIFORNIA INSURANCE CODE SECTION 10270.65 IS PREEMPTED BY ERISA

Petitioners have argued throughout this litigation that their retention of the more than $629,000 in proceeds from the UNUM distribution was justified due to their interpretation of California Insurance Code Section 10270.65, a provision, which Petitioners were not even aware of until after plaintiff filed his original complaint. As both the District Court and the Ninth Circuit correctly found, this statute is preempted by ERISA.

In enacting ERISA, Congress meant to establish employee benefit plan regulation as "exclusively a federal concern," limited only by the terms of ERISA itself. *Pilot*

Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549, 1553 (1987); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985); *Alessi v. Raybestos Manhattan Inc.*, 451 U.S. 504, 523 (1981). Accordingly, Congress enacted the broadest type of preemption clause, one which occupies the field of employee benefit plans to the exclusion of all state law. *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1215 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981). In enacting ERISA, Congress sought to "eliminate the threat of conflicting and inconsistent state and local regulations" relating to employee benefit plans. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

Throughout this litigation, BEHR has argued that, notwithstanding the above authorities, the preemption provision of ERISA does not apply to Section 10270.65 because of the narrow exception to the preemption provision contained in 29 U.S.C. §1144(b)(2)(A), known as the "saving clause." However, this provision saves from preemption only those state laws which specifically relate to the *business* of insurance. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985); *Moore v. Provident Life and Accident Ins. Co.*, 786 F.2d 922, 926 (9th Cir. 1986). Specifically, it is restricted to state laws "regulating insurance companies and insurance contracts." *United Ford and Commercial Workers Employers Arizona Health and Welfare Trust v. Pacyga*, 801 F.2d 1157, 1159 (9th Cir. 1986); *Moore*, 786 F.2d at 926. It does not exempt state regulations relating to the administration of employee benefit plans, such as Insurance Code Section 10270.65. BEHR has continually tried to cloud the distinction between regulating insurance companies and regulating the administration of insurance plans. Yet, as noted by the court in *Eversole v.*

Metropolitan Life Insurance Co., 500 F.Supp. 1162, 1169 (C.D. Cal. 1980):

> "The distinction between laws regulating an [employee benefit plan] and laws regulating an insurance company from which the plan purchased the insurance *is fundamental.*" (emphasis added.)

In determining whether a state law falls under the saving clause as a law "regulating insurance," the Court has utilized case law interpreting almost identical language found in the McCarran-Ferguson Act, 15 U.S.C. §1011 *et seq*. Three criteria have been used to determine whether a practice falls under this provision:

> *First*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry, (emphasis in original.)

Pilot Life, 481 U.S. at ___, 107 S.Ct. at 1553-54 (quoting *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982)); *see also Pacyga, supra*, 801 F.2d at 1161.

Section 10270.65 of the California Insurance Code satisfies none of the elements of this test. First, Section 10270.65 does not transfer or spread the policyholder's "risk;" the state statute deals solely with the administration of certain plan assets, i.e., dividends and refunds, and how an employer in his fiduciary capacity must deal with these assets. It does not deal with the coverage under any policy, the terms and conditions of any policy, or the circumstances under which such "dividends and refunds" are to be paid in the first place.

Second, this state statute is not an "integral part of the policy relationship" between the insurer and the insured. The statute deals only with the relationship between the *policyholder* and the insured. Realistically, there was little relationship between the "insurer", (Unionmutual), and the "insured," (the BEHR employees participating in the plan). The BEHR employees had a "relationship" solely with BEHR and the BEHR LTD Plan; it was BEHR itself, as administrator and fiduciary of the Plan, which procured the policy from Unionmutual, and handled all necessary administrative functions under the policy. In a sense, BEHR acted to insulate the insurer from the insured by creating the BEHR LTD Plan. Section 10270.65 has nothing to do with the relationship between the *insurer* and the insured.

Third, the state statute in question is not limited to "entities within, the insurance industry" as mandated by the *Pilot Life* three-part test. By its terms, the statute in no way applies to insurance companies. Rather, the statute is aimed at any entity which holds or administers a group disability insurance policy on behalf of its employees. In fact, the state insurance code provision asserted by defendants has been found specifically not to apply to insurance companies, but solely to administrators of group policies. *See Keniston v. American National Insurance Company*, 31 Cal.App.3d 803, 810, 107 Cal.Rptr. 583 (1973) (obligations under this statute imposed upon employer/administrator of group policy, not insurance company). Thus, not only is the statute not "limited" to insurance companies, it is, by its language and case interpretation, inapplicable to such companies. As *Pilot Life* concludes:

> A common-sense view of the word "regulates" would lead to the conclusion that in order to regulate insurance, a law must not just have an impact on the insurance industry, but be *specifically directed toward that industry.*

481 U.S. at ___, 107 S.Ct. at 1554 (emphasis added).

The cases cited by BEHR are inapposite. In *General Motors Corp. v. California State Board of Equalization,* 815 F.2d 1305 (9th Cir. 1987), the Ninth Circuit correctly "saved" from preemption new California Revenue and Tax Code provisions which permitted the state to impose a tax on gross premiums received by *insurance companies* doing business in California. Similarly, in *Metropolitan Life, supra,* the Supreme Court properly saved from preemption a state statute which mandated in inclusion of mental health care benefits in all insurance contracts, since the statute related to the "business of insurance." *Id.* at 740. Both of these opinions are consistent with the purpose of the saving clause, which is to leave to the states the "[regulation of] insurance companies and insurance contracts." *Pacyga, supra,* 801 F.2d at 1159. Neither case, however supports BEHR here, since the administration of benefit plans is solely a federal concern.

Simply stated, therefore, the "saving clause" has the very limited effect of saving from preemption state regulation of insurance companies and terms of insurance contracts – it does not exempt state regulation of employee benefit plans funded by the insurance industry. To claim that the saving clause exempts Section 10270.65 from preemption would have the effect of nullifying the entire preemption clause. Clearly, such a broad view of the saving clause is not warranted by either legislative

history or case law. It is of crucial importance to realize that with approximately twenty states with statutes similar to California's Section 10270.65, Petitioners do not cite a single one which has been cited as authority since the passage of ERISA. Congress did not intend to preempt state regulation of benefit plans and then exempt every regulation it just preempted. As this Court noted tongue-in-cheek in *Metropolitan Life:*

> "While Congress occasionally decides to return to the States what it has previously taken away, it does not normally do so at the same time."

471 U.S. at 740; 105 S.Ct. at 2389. Section 10270.65 is preempted by ERISA.

III. THE NINTH CIRCUIT CORRECTLY AFFIRMED THE AWARD OF ATTORNEY'S FEES TO PLAINTIFFS

BEHR next argues that the district court improperly awarded attorney's fees to plaintiffs, arguing that such an award is intended to punish or deter improper actions by plan administrators, and that since the District Court found no specific breach of fiduciary duty, the awarding of fees was improper. Such a claim is also meritless.

An award of attorney's fees under ERISA must be upheld on appeal unless defendants can demonstrate that the district court abused its discretion. *Monkelis v. Mobay Chemical,* 827 F.2d 935 (3rd Cir. 1987); *Firestone Tire and Rubber Co. v. Neusser,* 810 F.2d 550 (6th Cir. 1987). An abuse of discretion exists only when the Court has the "definite and firm conviction" that the district court made a clear error of judgment in its conclusion upon

weighing relevant factors. *Secretary of the Department of Labor v. King*, 775 F.2d 666, 669 (6th Cir. 1985).

Petitioners are correct that the Ninth Circuit relies upon the factors set forth in the case of *Hummell v. S. E. Rykoff & Co.*, 634 F.2d 446, 452 (9th Cir. 1980), in determining whether the awarding of attorneys' fees to a party is warranted. In the Statement of Uncontroverted Facts and Conclusions of Law, signed by the Court over written objection by the defendants, the *Hummell* factors are analyzed in the context of this case:

> The defendants have the ability to satisfy the awarding of attorney's fees in this litigation, and the awarding of fees will hopefully deter other individuals and entities faced with a similar situation from acting in such an arbitrary and capricious manner. It is further noted that plaintiff John Ruocco was seeking to benefit all participants of the BEHR Ltd Plan, and also sought to resolve significant legal questions concerning ERISA, specifically involving the distribution of surplus assets, and the parameters of federal preemption. For all of these reasons, the Court finds the awarding of attorney's fees in this case to plaintiff is appropriate and reasonable.

(Pages A26-27 to Petition). Petitioners argue that the award of fees was improper since there was no finding of "bad faith" by the District Court. This argument is specious for two reasons. First, the degreed culpability is only one of many factors to consider in awarding fees under ERISA. Secondly, bad faith is not a prerequisite to an award of attorney's fees. *See Tabac v. Kinney*, 672 F.Supp. 334 (N.D. Ill. 1987); *Hollenbeck v. Falstaff*, 605 F.Supp. 921 (D.C. Mo. 1984), *aff'd* 780 F.2d 20 (1985). The

district court did not abuse its discretion in awarding fees in this case.

CONCLUSION

Both the District Court and the Ninth Circuit Court of Appeals have found that Defendants' retention of the UNUM distribution was improper. Contrary to Petitioner's representations, the decision of the lower courts has in no way "diminished the authority traditionally belonging to the states. . . . " Instead, both lower courts have recognized, as was Congress' intent, that the administration of group insurance policies is of such national importance as to necessitate a single set of rules to oversee these programs. Petitioners' arguments are inappropriate. As such, Respondents respectfully request this Court to deny this Petition for a Writ of Certiorari.

Respectfully submitted,

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